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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 176

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

APPELLANT,

Versus

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL.,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

BRIEF ON BEHALF OF ROY C. WALLACE, ET AL., DEFENDANTS

R. H. BEELER,
Attorney-General of the State of Tennessee.

W. F. BARRY, JR.,
Assistant Attorney-General.

EDWIN F. HUNT,
Assistant Attorney-General.

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MAY IT PLEASE THE COURT:

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

By a journal entry of October 10, 1932, this Court entered an order in the present cause, which was in the following language:

> "Further consideration of the jurisdiction of this Court is postponed to the hearing upon the merits. The attention of counsel is invited to the question whether a case or controversy is presented, in view of the nature of the proceedings in the state courts."

In the discussion of this question the exact nature of the proceedings in the State courts becomes important.

The original bill was a proceeding under the Declaratory Judgments Act of Tennessee, Chapter 29 of the Public Acts of 1923. Complainants, in their bill, sought a construction of the various gasoline taxing statutes of the State of Tennessee and a declaration as to the constitutional validity of said statutes if they were construed as applicable to complainant.

No relief was sought by the bill, or could be had under the pleadings in the case, other than a declaratory judgment or decree construing the statutes in question.

The Declaratory Judgments Law of Tennessee has been held constitutional by the Supreme Court of that State.

Miller et al. v. *Miller*, 149 Tenn., 463.

As construed by the Supreme Court of Tennessee, the only controversy necessary to invoke action of the Court under the Declaratory Judgments

Law is that the question must be real and not theoretical, that the person raising it must have a real interest, and that there must be some one having real interest who may oppose the declaration sought.

Complainant alleges in its bill that the respondents, officials of the State of Tennessee, have called upon the complainant to pay to the State of Tennessee, privilege taxes alleged to be due. This allegation was necessary before the courts of Tennessee would entertain jurisdiction of the suit under the Declaratory Judgments Law in order that it might be shown that the complainant had a real interest in the questions raised.

The proceeding did not seek injunctive or other equitable relief from the claim of the State officials that certain privilege taxes were due. Indeed, a suit to enjoin the collection of state revenue would not have been maintainable in view of a Tennessee statute of 1873 (Section 1790, et seq., Tennessee Code of 1932), which provides that the sole and exclusive remedy of a taxpayer shall be payment of the allegedly unjust or illegal taxes under protest and suit for their recovery. This statutory remedy has been pronounced by this Court as "simple and effective" in the case of *Shelton* v. *Platt*, 139 U. S., 591.

A demurrer was filed to the bill and the demurrer was sustained, the chancellor being of the opin-

ion that the taxing statutes in question were applicable to the complainant and that such applicability did not render the statutes unconstitutional.

The opinion of the Supreme Court of Tennessee affirmed the decree of the chancellor, the said Court holding that the taxing statutes involved applied to those situated as complainant.

The proceeding was brought under a declaratory judgments act and the only relief sought or authorized was a declaratory judgment or decree construing the taxing statutes involved and determining the constitutional validity of the statutes so construed. The effect of the judgment or decree in the present proceeding is not to determine the liability of this complainant or any other person for any particular sum of money as taxes.

The jurisdictional question presented in this cause may be stated as follows: Does the Supreme Court of the United States have constitutional power to review a declaratory judgment of a state court when such judgment involves a Federal question.

In *Muskrat* v. *United States*, 219 U. S., 346, 55 L. ed., 246, this Court held that since the jurisdiction of the Supreme Court is conferred and is limited by Article 3, Section 2, of the Constitution, Congress was without power to confer upon this Court jurisdiction to determine the constitutional

validity of legislation without a "case" or "controversy" within the meaning of the Constitution. The opinion contains a full discussion of what constitutes a case or controversy within the meaning of the Federal Constitution. In this opinion the following was said:

> "It is therefore apparent that from its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.
>
> "It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and, with the aid of appropriate legislation, upon the inferior courts of the United States. 'Judicial power,' says Mr. Justice Miller, in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' Miller, Const. 314.
>
> "As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.
>
> "What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies.' A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of Marbury v. Madison 1 Cranch, 137, 2 L. ed. 60, to be a suit instituted according to the regular

course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy?' That question was dealt with by Mr. Justice Field, at the circuit, in the case of Re Pacific R. Commission, 32 Fed. 241, 255. Of these terms that learned justice said:

" 'The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. Chisholm v. Georgia, 2 Dall. 431, 432, 1 L. ed. 445, 446, 1 Tucker's Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication."

. . . . . .

"It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have

> seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States the judicial power extends."

Muskrat v. United States, 250, 251-252.

In *Liberty Warehouse Co. et al.* v. *Grannis*, 273 U. S., 70, 71 L. ed., 541, this Court held that the Federal courts have no jurisdiction of a proceeding under a declaratory judgment act of a state to determine the rights of petitioner under a statute of the state prior to the institution of an adverse proceeding under the statute. In this case a bill was filed in a Federal District Court of Kentucky, seeking a judgment under a declaratory judgment law of Kentucky. The District Court dismissed the petition upon demurrer on the

ground that it had no jurisdiction of the cause of action set forth. The judgment dismissing the petition for want of jurisdiction was affirmed. In the opinion of this Court, it is said:

> "The sole purpose of the petition, as shown by its express allegations, is to obtain a declaration from the District Court of the rights and duties of the plaintiffs under the Act of 1924, and a determination of the extent to which they must comply with its provisions in the conduct of their business. This is its entire scope. While the Commonwealth Attorney is made a defendant as a representative of the Commonwealth, there is no semblance of any adverse litigation with him individually; there being neither any allegation that the plaintiffs have done or contemplate doing any of the things forbidden by the Act before being advised by the court as to their rights, nor any allegation that the Commonwealth Attorney has threatened to take or contemplates taking any action against them for any violation of the Act, either past or prospective. And no relief of any kind is prayed against him, by restraining action on his part or otherwise.
>
> "The question whether the District Court has jurisdiction to entertain such a petition for a declaration of rights admits of but one answer under the prior decisions of this Court.
>
> "We need not review these at length. It suffices to say that in the light of the decisions in Muskrat v. United States, 219 U. S. 346, 357, 55 L. ed. 246, 250, 31 Sup. Ct. Rep. 250; Fairchild v. Hughes, 258 U. S. 126, 129, 66 L.

ed. 499, 504, 42 Sup. Ct. Rep. 274; Texas v. Interstate Commerce Commission, 258 U. S. 158, 162, 66 L. ed. 531, 537, 42 Sup. Ct. Rep. 261; Keller v. Potomac Electric Co. 261 U. S. 428, 444, 67 L. ed. 731, 736, 43 Sup. Ct. Rep. 445; Massachusetts v. Mellon, 262 U. S. 447, 488, 67 L. ed. 1078, 1085, 43 Sup. Ct. Rep. 597; New Jersey v. Sargent, 269 U. S. 328, 330, 70 L. ed. 289, 46 Sup. Ct. Rep. 122; and Postum Cereal Co. v. California Fig Nut Co. 272 U. S. 693, ante, 478, 47 Sup. Ct. Rep. 284, in which the principles stated in earlier cases are considered and applied—it is not open to question that the judicial power vested by article 3 of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder, extends only to 'cases' and 'controversies' in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case."

. . . . . .

"It follows necessarily from these decisions that the District Court, as a court of the United States established under article 3 of the Constitution, had no jurisdiction to enter-

tain the petition for the declaratory judgment."

Liberty Warehouse Co. v. *Grannis*, 71 L. ed., 544, 545.

In *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Association*, 276 U. S., 71, 72 L. ed. 473, the rule was again announced that this Court has no jurisdiction to review a mere declaratory judgment of a state court. This case was an appeal from a proceeding begun in a state court. In the proceeding the defendant filed an answer based upon the Declaratory Judgment Law of Kentucky in which the Court was asked to determine the validity of the Co-operative Marketing Act of Kentucky and to declare the rights and duties of the parties. The trial court struck this portion of the answer from the record, which action was held by this Court to have been no abuse of power. The opinion contains the following:

> "Apparently the Declaratory Judgment Statute authorizes plaintiffs only to ask for judgments. It also provides: 'The court may refuse to exercise the power to declare rights, duties or other legal relations in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action, or in any case where the declaration or construction is not necessary or proper at the time under all the circumstances.' This court has no jurisdiction to review a mere declaratory judgment. Liberty Warehouse

Co. v. Grannis, 273 U. S. 70, 71 L. ed. 541, 47 Sup. Ct. Rep. 282."

Liberty Warehouse Co. v. *Burley T. G. Co-op. M. Asso.*, 72 L. ed., 479.

In *Willing* v. *Chicago Auditorium Association*, 277 U. S. 274, 72 L. ed., 880, this Court held again that the Federal Judiciary is without power to render a declaratory judgment. In this case a bill was filed in a Federal district court of Illinois, which sought a determination of the respective rights of a landlord and tenant under the terms of a lease. The bill was held not to state a case of which the Federal courts have jurisdiction. In the opinion it was said:

"What the plaintiff seeks is simply a declaratory judgment. To grant that relief is beyond the power conferred upon the Federal judiciary. Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 74, 71 L. ed. 541, 544, 47 Sup. Ct. Rep. 282. Compare Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Asso. 276 U. S. 71, ante, 473, 48 Sup. Ct. Rep. 291. The statement, made at the bar, that Blair v. Chicago, 201 U. S. 400, 450, 50 L. ed. 801, 822, 26 Sup. Ct. Rep. 427, supports the jurisdiction, is unfounded.

"It is true that this is not a moot case, like Singer Mfg. Co. v. Wright, 141 U. S. 696, 35 L. ed. 906, 12 Sup. Ct. Rep. 103, and United States v. Alaska S. S. Co. 253 U. S. 113, 64 L. ed. 808, 40 Sup. Ct. Rep. 448; that, unlike Keller v. Potomac Electric Power Co. 261 U. S. 428, 444, 67 L. ed. 731, 736, 43 Sup. Ct. Rep. 445, and Postum Cereal Co. v. California

Fig Nut Co. 272 U. S. 693, 71 L. ed. 478, 47 Sup. Ct. Rep. 284, the matter which it is here sought to have determined is not an administrative question; that the bill presents a case, which if it were the subject of judicial cognizance, would in form come under a familiar head of equity jurisdiction; that, unlike Gordon v. United States, 117 U. S. 697, a final judgment might be given; that, unlike South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co. 145 U. S. 300, 36 L. ed. 712, 12 Sup. Ct. Rep. 921, the parties are adverse in interest; that, unlike Fairchild v. Hughes, 258 U. S. 126, 66 L. ed. 499, 42 Sup. Ct. Rep. 274, and Massachusetts v. Mellon, 262 U. S. 447, 67 L. ed. 1078, 43 Sup. Ct. Rep. 597, there is here no lack of a substantial interest of the plaintiff in the question which it seeks to have adjudicated; that, unlike New Jersey v. Sargent, 269 U. S., 328, 70 L. ed. 289 U. S. 328, 70 L. ed. 289, 46 Sup. Ct. Rep. 122 the alleged interest of the plaintiff is here definite and specific; and that there is here no attempt to secure an abstract determination by the court of the validity of a statute, as there was in Muskrat v. United States, 219 U. S. 346, 361, 55 L. ed. 246, 251, 31 Sup. Ct. Rep. 250, and Texas v. Interstate Commerce Commission, 258 U. S. 158, 162, 66 L. ed. 531, 537, 42 Sup. Ct. Rep. 261. But still the proceeding is not a case or controversy within the meaning of article 3 of the Constitution."

Willing v. *Chicago Auditorium Asso.*, 72 L. ed., 884-885.

While the jurisdiction of this Court was not invoked upon the ground that a declaratory judg-

ments law of a state authorized the judgment or decree appealed from, the decision is authority for the proposition that a declaratory judgment of a state court is not a case or controversy within the meaning of the Federal Constitution. That this inference is justified by the case is made quite apparent by the concurring opinion which is as follows:

> "Concurring opinion of Mr. Justice Stone:
> "I concur in the result. It suffices to say that the suit is plainly not one within the equity jurisdiction conferred by Sections 24, 28, of the Judicial Code. But it is unnecessary, and I am therefore not prepared to go further and say anything in support of the view that Congress may not constitutionally confer on the Federal courts jurisdiction to render declaratory judgments in cases where that form of judgment would be an appropriate remedy, or that this court is without constitutional power to review such judgments of state courts when they involve a Federal question. . . ."
>
> *Willing* v. *Chicago Auditorium Asso.*, supra, p. 885.

In *Arizona* v. *California*, 283 U. S., 423, 75 L. ed., 1154, the proposition was again announced that this Court cannot issue declaratory decrees.

Numerous decisions of this Court determine what are "cases" and "controversies" within the meaning of Article 3, Section 2 of the Constitution.

Cases which support the insistence that this Court is without power to review a declaratory judgment of a state court are the following:

United States v. *Hamburg Amerikanische Co.*, 239 U. S. 466, 60 L. ed. 387.
Fairchild v. *Hughes*, 258 U. S. 126, 66 L. ed. 499.
Texas v. *Interstate Commerce Com.*, 238 U. S. 158, 66 L. ed. 531.
Keller v. *Potomac Electric Power* Co., 261 U. S. 428, 67 L. ed. 731.
Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491, 67 L. ed. 763.
Massachusetts v. *Mellon*, 262 U. S. 447, 67 L. ed., 1078.
New Jersey v. *Sargent*, 269 U. S. 328, 70 L. ed. 289.
Postum Cereal Co. v. *California Fig Nut Co.*, 272 U. S. 693, 71 L. ed. 478.
Exparte Bakelite Corporation, 279 U. S. 438, 73 L. ed. 789.

SUMMARY OF ARGUMENT CONCERNING JURISDICTION OF SUPREME COURT OF UNITED STATES

This is a proceeding under a declaratory judgment law. The original bill expressly provided that it was filed as such suit (R., p. 13), and sought no relief other than the construction of the statutes in question (R., p. 22). In this connection it should be noted that the portion of the prayer for relief which sought a decree that the complainant did not owe any sum as a privilege tax under said statutes was stricken out of the bill by amendment (R., p. 28). The opinion of the Supreme Court of Tennessee recognized and treated the suit merely as one in which a declaratory judgment was sought and obtained. The only relief sought from the Supreme Court of the United States in this proceeding is a reversal of a declaratory judgment rendered by the state courts. The effect of a consideration by this Court of the present case upon its merits will be the rendition by it of a declaratory judgment.

This Court has declared that the Federal judiciary has no power to render a declaratory judgment. It has denied that the Federal district courts have the power to proceed under a state declaratory judgments statute. It has said that the fact that a case is not a moot one, the fact that a final judgment might be given, the fact that

there are adverse parties in interest, and the fact that the plaintiff in error has a real and substantial interest in the question, do not constitute a case or controversy within the meaning of Article 3 of the Constitution. All of these elements the Supreme Court of Tennessee has said are required before a suit brought under the State Declaratory Judgment Law will be entertained, but the presence of these elements does not prevent the suit from being simply a declaratory proceeding. Indeed, the Supreme Court of Tennessee, in sustaining the validity of the Declaratory Judgment Law of Tennessee, recognized that its State Constitution did not impose the same limitations upon the jurisdiction of its courts as was imposed by the Federal Constitution upon the Federal judiciary.

> "In *Muskrat* v. *United States*, supra, and the other decisions of the Supreme Court of the United States relied on by the majority in the Anway case to support its holding that the act there involved was unconstitutional, no actual controversy existed between the opposing parties. An examination of the federal Constitution (article 3, section 2) discloses that the judicial power of the court is limited to cases and controversies. Therefore we do not think that the case of *Muskrat* v. *United States*, and the other federal decisions cited in the majority opinion in the Anway Case, are controlling in the instant cause."

Miller v. *Miller*, 149 Tenn., 484.

It is true that the declaratory judgment of the State courts in this proceeding involved a Federal question. However, this is merely another manner of saying that the proceeding presents a case of which this Court would take jurisdiction "if it were the subject of judicial cognizance" by the Federal courts. As this Court said in *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S., 673, 71 L. ed., 478, even if the effect of this conclusion were to leave the plaintiff in error without any other remedy "as to which we express no opinion, it cannot furnish a reason for exceeding the constitutional powers of this Court."

For the foregoing reasons, it is respectfully insisted that the present proceeding is not a case or controversy within the meaning of Article 3 of the Constitution and that this Court is without jurisdiction.

BRIEF UPON VALIDITY OF STATE GASOLINE TAXING STATUTES

No statement of the case will be made. An outline of the pleadings and of the facts is contained in complainant's brief, which is full and accurate, and which renders unnecessary a further statement of the facts.

It is submitted that the Federal questions which arise in this cause are the following:

1. Is a privilege tax upon the storage of gasoline invalid as contravening the commerce clause of the Constitution when applied to an interstate railroad carrier which purchases gasoline in another state, ships it into the state of the tax and stores it in such state, intending to withdraw it from storage for use in essential railroad operations?

2. Does the fact that the tax burden levied by a series of statutes upon common carriers by railroad is "economically disproportionate" to the tax burden levied upon common carriers by motor vehicle render invalid as a violation of the 14th Amendment any or all of the statutes taxing common carriers by railroad?

Various incidental questions arise in the consideration of the two questions above stated. If the State cannot validly tax the storage and with-

drawal of gasoline which is intended to be transported elsewhere and used, can it validly tax the storage and withdrawal of gasoline which is to be consumed within the State, when such consumption is to be a part of interstate commerce?

Other questions are stated in the brief of appellant as arising on this record and these will be hereafter considered in the argument.

The following propositions of law are urged by appellees as supporting the decision of the State courts that the statutes involved in this proceeding are valid and enforceable and are applicable to the complainant railway in its storage of gasoline.

I.

The statutes in question, as construed by the highest Court of Tennessee, impose a privilege tax upon all persons who store gasoline in Tennessee, thereafter withdrawing same from storage whether for sale or other use.

Foster & Creighton Co. v. *Graham*, 154 Tenn., 412, 420.
Quick Service Tire Co. v. *Smith*, 156 Tenn., 96, 102.

II.

The construction of a state statute by the highest

Court of the State is binding upon the Supreme Court of the United States.

Tullis v. *Lake Erie & W. R. Co.*, 175 U. S. 348, 44 L. ed. 192.
W. W. Cargill Co. v. *Minnesota*, 180 U. S. 452, 45 L. ed. 619.
Missouri P. R. Co. v. *Nebraska*, 164 U. S. 403, 41 L. ed. 489.
Roe v. *Kansas ex rel*, 278 U. S. 189, 73 L. ed. 260.
Wick v. *Chelan Electric Co.*, 280 U. S. 108, 74 L. ed. 216.

III.

Under the Constitution of Tennessee the Legislature has unlimited and unrestricted power to tax privileges, which power may be exercised in any mode or manner at its discretion.

Wilson v. *State*, 143 Tenn., 72
Jenkins v. *Ewin*, 55 Tenn., 473.
Shelton v. *Silverfield*, 104 Tenn., 71.
Trentham v. *Moore*, 110 Tenn., 352.
Bank v. *Senter*, 149 Tenn., 569.
Ogilvie v. *Hailey*, 141 Tenn., 392.

IV.

A state has the power, unfettered by the commerce clause, to impose a privilege tax upon the sale or the storage of gasoline which has reached its destination, has ceased to move in interstate

commerce and has been transferred from the tank cars in which transported into a storage warehouse. Of course, the tax imposed is valid only if it does not discriminate against the gasoline as an article coming from interstate commerce.

Woodruff v. *Parham*, 8 Wall. 123, 19 L. ed. 382.
Hinson v. *Lott*, 8 Wall. 148, 19 L. ed. 387.
Brown v. *Houston*, 114 U. S. 622, 29 L. ed. 257.
American Steel & Wire Co. v. *Speed*, 192 U. S. 522, 48 L. ed. 547.
Sonneborn Bros. v. *Keeling*, 262 U. S. 506, 67 L. ed. 1097.
Hart Refineries v. *Harmon*, 278 U. S. 499, 73 L. ed. 475.

V.

The fact that at the time of the storage of the gasoline and at the time of its withdrawal from storage, the owner intends that the gasoline, or a portion of it, shall be used in carrying on interstate commerce, does not affect the right of the State to tax the storage and withdrawal.

Coe v. *Errol*, 116 U. S. 517, 29 L. ed. 715.
Heisler v. *Thomas Collieries Co.*, 260 U. S. 245, 259, 67 L. ed. 237.
Crescent Cotton Oil Co. v. *Miss.*, 257 U. S. 129, 66 L. ed. 166.
Texas Co. v. *Brown*, 258 U. S. 466, 66 L. ed. 721.

Oliver Iron Co. v. *Lord*, 262 U. S. 172, 67 L. ed. 929.
Hope Gas Co. v. *Hall*, 274 U. S. 284, 71 L. ed. 1049.
N. J. Bell Telephone Co. v. *State Board*, 280 U. S. 338, 74 L. ed. 1004.
Eastern Air Transport v. *S. C. Tax Com.*, 285 U. S. 147, 76 L. ed. 470.
Gregg Dyeing Co. v. *Query*, — U. S. —, 76 L. ed. 852.

VI.

The statutes in question impose a privilege tax upon the sale or storage of gasoline in Tennessee and not a charge for the use of the State highways.

Chapter 54, Public Acts of Tenn., 1927.
Chapter 45, Public Acts of Tenn., 1931.
Chapter 11, Public Acts of Tenn., 2nd Extra Session, 1931.
Kane v. *N. J.*, 242 U. S. 160, 61 L. ed. 222.
Clark v. *Poor*, 274 U. S. 554, 71 L. ed. 1199.
Sprout v. *South Bend*, 277 U. S. 169, 72 L. ed. 836.
Interstate Transit Co. v. *Lindsey*, 283 U. S. 183, 75 L. ed. 952.
Foster & Creighton Co. v. *Graham*, 154 Tenn., 412.

VII.

Common carriers by railroad and common carriers by motor vehicle constitute different class-

es of taxpayers which the State is not required to tax in the same manner or equally. The fact that the tax burden imposed upon carriers by railroad may be greater than that imposed upon carriers by motor vehicle under the taxing statutes of Tennessee, does not constitute a violation of the due process clause, or of the equality clause of the 14th Amendment.

Dane v. *Jackson*, 256 U. S. 289, 65 L. ed. 1107.
Kelly v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658.
Green v. *Frazier*, 253 U. S. 233, 64 L. ed. 878.
Shaffer v. *Carter*, 252 U. S. 37, 64 L. ed. 445.
Mutual L. Ins. Co. v. *Wisconsin*, 247 U. S. 132, 62 L. ed. 1025.
Mich. Centr. R. Co. v. *Powers*, 201 U. S. 245, 50 L. ed. 744.
Citizens Tel. Co. v. *Fuller*, 229 U. S. 322, 57 L. ed. 1206.
Quong Wing v. *Kirkendall*, 223 U. S. 59, 56 L. ed. 350.
St. Louis S. W. R. Co. v. *Arkansas*, 235 U. S. 350, 59 L. ed. 265.
Atchison T. & S. F. R. Co. v. *Matthews*, 174 U. S. 96, 43 L. ed. 909.
Lake Superior Con. Iron Lines v. *Lord*, 271 U. S. 575, 70 L. ed. 1093.
Oliver Iron Co. v. *Lord*, 262 U. S. 172, 67 L. ed. 929

ARGUMENT

I.

THE STATUTES IN QUESTION IMPOSE A PRIVILEGE TAX UPON THE STORAGE OF GASOLINE AND NOT MERELY UPON THOSE ENGAGED IN THE GASOLINE BUSINESS

Chapter 58 of the Public Acts of Tennessee for 1923, as amended by Chapter 67 of the Acts of 1925, imposes a privilege tax upon all persons who sell, distribute or store gasoline in Tennessee. The question asked on page 2 of appellant's brief as to the power of the State to tax an interstate common carrier for the privilege of doing a business which it does not do and which it cannot legally do is based upon a construction of these statutes contrary to the precise language of the statute and contrary to the construction placed upon them by the Supreme Court of Tennessee. Chapter 67, Acts of 1925, amends the original gasoline taxing statute (Chapter 58, Acts of 1923) by adding to it the following:

> "The tax imposed by this Act shall apply to persons, firms, or corporations, dealers or distributors, storing any of the products mentioned in this Act, and distributing the same, or allowing the same to be withdrawn from storage, whether such withdrawal be for sale

> or other use; provided that 'sellers' of gasoline and such substitutes thereof and distillates paying the tax herein provided may continue to pay the same computed and paid on the basis of their sales as hereinbefore required and stores and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

In *Foster & Creighton Company* v. *Graham*, 154 Tenn., 412, at page 420, the Supreme Court of Tennessee construed this tax in the following language:

> "We think the act, when properly interpreted, not only applies to distributors and dealers in gasoline, but applies to consumers who purchase gasoline in interstate commerce and store it, and thereafter distribute the same, or allow the same to be withdrawn from storage, whether such withdrawal be for sale or other use. It therefore necessarily follows that complainant, and all other persons, etc., in like situations, come within the provisions of said act."
>
> *Foster & Creighton Co.* v. *Graham*, 154 Tenn., 420.

In *Quick Service Tire Company* v. *Smith*, 156 Tenn., 96, at page 102, the Supreme Court of Tennessee again interpreted the provision above quoted in the following language:

> "By Chapter 67, Acts of 1925, the tax of three cents a gallon was made to apply not only to gasoline sold and distributed to con-

> sumers, but also 'to persons, firms or corporations, dealers or distributors, storing . . . . and distributing the same,' and under this Act it was held in *Foster & Creighton Co.* v. *Graham, supra,* that one storing gasoline for personal use could not avoid payment of the tax of three cents a gallon on gasoline."
>
> *Quick Service Tire Co.* v. *Smith,* 156 Tenn., 102.

In view of this interpretation of the statute, it is clear that the tax is not imposed merely upon those engaged in the gasoline business, and the plaintiff Railroad is not taxed for engaging in the gasoline business. The privilege tax is imposed by the statute upon the storage of gasoline.

Of course, neither the name by which the tax is called, nor the construction given it by the State courts will prevent this Court from declaring it invalid if it is a direct burden or tax upon interstate commerce. The present tax, however, is a privilege tax applicable alike to all persons, firms, and corporations storing gasoline. The storage of gasoline cannot be interstate commerce. It is essentially a local transaction or occurrence. The storage of gasoline in a general warehouse constructed for that purpose of itself implies that something is done locally and not as an integral part of interstate commerce. The storage by the railroad of gasoline is not an integral part of interstate commerce, but is incidental to its operations as a railroad. The present tax is not an effort to burden

commerce, it is not an attempt to break up essential operations of the business of carrying by railroad, but it is a tax upon a domestic operation, which tax applies to the railroad only when it does what other persons do and for which it is taxed only as all other storers are taxed.

II.

THE CONSTRUCTION OF A STATE STATUTE BY THE HIGHEST COURT OF THE STATE IS BINDING UPON THIS COURT

The Supreme Court of Tennessee has construed these statutes as being a tax upon the storage of gasoline measured by withdrawals. The appellant seeks to construe these statutes as providing a tax upon the privilege of engaging in the gasoline business and asserts that the N. C. & St. L. Railway has no charter power to engage in such business. The question of the construction of the statutes is not now an open one. The appellant cannot be heard to insist that these statutes say one thing and mean another, when they have been construed by the highest court of the State as meaning what they say. The question of the interpretation of these statutes has been definitely foreclosed and is not open in this forum. The proposition is elementary that the construction placed upon a state statute by the highest court of the state is binding upon this Court. Cases supporting this fundamental and undisputed rule will not be reviewed here, as such a discussion is unnecessary.

III.

THE POWER OF THE LEGISLATURE OF TENNESSEE TO TAX PRIVILEGES IS UNLIMITED UNDER ITS STATE CONSTITUTION

The statutes of Tennessee have declared the storage of gasoline to be a privilege and have levied a privilege tax upon such storage. Counsel for appellant cite authority to the effect that in Tennessee the mere ownership of property cannot be made a taxable privilege and that to constitute the basis of a privilege tax one must "make a business" of doing that which is taxed. The modern decisions of the Supreme Court of Tennessee place no such limitation upon privilege taxation in the State. The Legislature of Tennessee has unrestricted power to tax privileges. The broad extent of this taxing power may be illustrated by *Ogilvie* v. *Hailey*, 141 Tenn., 392, in which the Supreme Court of Tennessee sustained an act levying a privilege tax on automobiles used for pleasure. In the opinion it is said:

> "It is next insisted that the use of automobiles for pleasure cannot be declared a privilege, inasmuch as such use is not the pursuit of any business or occupation, and it is sought to limit a privilege to such pursuits.
>
> "While some of our older cases apparently

justify these arguments, later decisions of this court declare that the doing of a single act may be declared a privilege."

Ogilvie v. *Hailey*, 141 Tenn., 397.

IV.

THE STATE HAS POWER TO TAX THE STORAGE OF GASOLINE WHICH HAS MOVED IN INTERSTATE COMMERCE AFTER IT HAS REACHED ITS DESTINATION

The privilege tax which the State in this case asserts is collectible is one upon gasoline brought into Tennessee from another state and stored by the plaintiff in its warehouse. The storage of this gasoline is not exempt from taxation because the gasoline originated in another state. Transportation of the gasoline has ceased before the act upon which the State seeks to fix the tax accrues. The gasoline has been removed from the tank cars in which it was transported and has been placed in storage. After the commerce has ceased and the gasoline has been placed in storage, it becomes property commingled with the general property of the State and amenable to its laws. The railroad, when it removes the gasoline from the tank cars in which it was transported and places it in storage in the State of Tennessee, so acts upon the gasoline that it becomes incorporated with the mass of property in the State. The storage of gasoline brought from another state cannot be exempt from taxation as interstate commerce because of the source of the goods. Of course, the tax which the State levies upon the storage of this

gasoline brought in from another state cannot be discriminatory and in fact such tax is not discriminatory because it is levied upon the storage of all gasoline, regardless of the place of its origin.

In *Woodruff* v. *Parham*, 8 Wall., 123, 19 L. ed., 382, this Court held that a privilege tax levied upon sales at auction was applicable to auction sales of merchandise from other states in original packages. It was said that the interstate transaction had ended at the time the tax liability sought to attach.

In *American Steel & Wire Company* v. *Speed*, 192 U. S., 500, 48 L. ed., 538, a merchant's tax upon goods brought into Tennessee from another state, stored in a warehouse in Tennessee and held for sale, was sustained, this Court saying that goods which were held in the warehouse were no longer in transit and had reached their destination, were not a part of interstate commerce and were taxable.

In *Sonneborn Bros.* v. *Keeling* 262 U. S. 506, 67 L. ed. 1097, this Court sustained an occupation tax upon a dealer in oil which had been transported into the state and held for sale. In this case it was held that the oil had reached its destination and was subject to the general taxing statutes of the state.

In *Hart Refineries* v. *Harmon*, 278 U. S. 499, 73 L. ed. 475, this Court said:

"This holding, as it was applied to the contention in the present case, seems to have been the result of a too literal reading of Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling) 262 U. S. 506, 67 L. ed. 1097, 43 Sup. Ct. Rep. 643, which was cited as authority. In that case, this court, upon a full review of the earlier cases, held that when a commodity shipped from another state had come to rest as a part of the stock in trade of the dealer, the interstate transportation was at an end, and whether in the original packages or not, a state tax upon the commodity, either as property or upon its sale in the state, if laid on the commodity generally without regard to its origin, would not constitute a burden upon or be a regulation of interstate commerce of which the commodity had been the subject. But there is nothing in the opinion to suggest that the taxing power of the state is limited to the two kinds of taxes mentioned. Interstate transportation having ended, the taxing power of the state in respect of the commodity which was the subject of such transportation, may, so far as the commerce clause of the Federal Constitution is concerned, be exerted in any way which the state's Constitution and laws permit, provided, of course, it does not discriminate against the commodity because of its origin in another state. That under such circumstances a tax may be imposed upon the use as well as upon the sale of the commodity in domestic trade, without coming into conflict with the commerce clause, was specifically determined in Bowman v. Continental Oil Co. 256 U. S. 642, 648, 65 L. ed. 1139, 1145, 41 Sup. Ct. Rep. 606."

Hart Refineries v. *Harmon*, 73 L. ed., 476.

The gasoline purchased by the plaintiff railroad in another state, brought into Tennessee and stored in this State, can derive no exemption from taxation because of its source and a privilege tax of the State upon the storage of gasoline is applicable to such gasoline as may have been imported and transferred into plaintiff's warehouse, as well as to gasoline purchased in the State.

V.

THE STATE HAS THE POWER TO TAX THE STORAGE OF GASOLINE, NOTWITHSTANDING THAT IT IS INTENDED SUBSEQUENTLY TO USE SUCH GASOLINE IN INTERSTATE COMMERCE

The question arises in this proceeding whether the fact that at the time of the storage of gasoline the storer intends that it shall be used in carrying on interstate commerce and stores it for that purpose affects the right of the State to tax the storage. The answer to this question is that the criterion by which the right of the State is to be judged is not the intention of the one storing the gasoline, but is the status of the property at the time of the transaction.

The leading case dealing with the right of the State to tax property intended for interstate commerce is *Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715. In that case it was held that goods intended for transportation to another state are liable to taxation as a part of the general mass of property of the state in which they are situate until actually started in transportation to the state of their destination. In this case Mr. Justice Bradley thus stated the rule:

> "What we have already said, however, in relation to the products of a State intended

for exportation to another State will indicate the view which seems to us the sound one on that subject, namely: that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule, in many states there would be nothing but the lands and real estate to bear the taxes. . . ."

Coe v. *Errol*, 29 L. ed., 719.

General Oil Co. v. *Crain*, 209 U. S. 211, 52 L. ed., 754, is a case which clearly illustrates the power of the State to tax property notwithstanding that such property is destined for sale or use in another state. In this case oil was shipped to Memphis, Tennessee, from refining points in Ohio and Pennsylvania. The oil was shipped in tank cars and was to be forwarded to customers in Arkansas, Louisiana and Mississippi. At Memphis the Oil Company maintained two storage tanks, one of which was plainly marked "Oil already sold in Arkansas, Louisiana and Mississippi." This oil remained in Memphis only long enough (a few days) to be properly distributed according to the orders therefor. The other tank was for oil sold

in those states and kept separate and apart until orders should be received from customers in those states. A statute of Tennessee subjected the oil to an inspection tax and the question was as to the validity of such tax. The court considered the case as involving the power of taxation and not as involving merely an inspection fee and sustained the validity of the tax. In the opinion it is said:

> "The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State, Detnold, Prosecutor, v. Engle, supra, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfil orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required storage there,—the maintenance of the means of storage; of putting it in and taking it from storage. The bill takes pains to allege this.
>
> . . . . . .
>
> "This certainly describes a business,—describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary,—a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in American Steel & Wire Co. v.

Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365."

General Oil Co. v. *Crain*, 209 U. S. 211, 52 L. ed., 765-766.

The facts of the case at bar are almost identical with the facts involved in General Oil Co. v. Crain. In both cases oil destined for use or sale in another state was brought into Tennessee, transferred from the tank cars in which it had been transported and placed in storage tanks in this State. Such action by the importer necessarily terminates interstate commerce and constitutes a definite interruption of transit by which the article acquires a situs in Tennessee.

The principle of General Oil Co. v. Crain, supra, was approved in Susquehanna Coal Co. v. Mayor, etc., of South Amboy, 228 U. S. 669, 57 L. ed. 1017, in which a state tax upon coal shipped into the state and stored for further shipment to ports in other states or countries was sustained. In this case also it was said that there was something more than an incidental interruption of the continuity of the transportation through the state.

In *Bacon* v. *Illinois*, 227 U. S. 504, 57 L. ed., 615, a state tax on grain stored in elevators pending inspection and shipment was sustained. In this case grain destined for transportation to Eastern cities was removed from the cars in which shipped at Chicago for inspection, weighing, etc. Such grain was held liable for local taxation under the

authority of General Oil Co. v. Crain, supra, American Steel & Wire Co. v. Speed, supra, etc. In the opinion it is said:

> "But neither the fact that the grain had come from outside the state, nor the intention of the owner to send it to another state, and there to dispose of it, can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported, and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not, as he chose. He might sell the grain in Illinois or forward it, as he saw fit. It was in his possession, with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation."
>
> *Bacon* v. *Illinois*, 227 U. S. 504, 57 L. ed. 620.

In *Crescent Cotton Oil Company* v. *State of Mississippi*, 257, U. S. 129, 66 L. ed. 166, it was held that the intention to export to another state when

manufactured, an article which was in process of manufacture, did not render it an article of interstate commerce. The same criterion which was applied in *Coe* v. *Errol*, to determine the right of the state to tax, was again applied in this case.

In *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 67 L. ed. 237, the validity of a state tax upon a particular kind of coal which was found exclusively in one state and the largest market for which was found in other states, was involved. The tax was imposed only upon coal "ready for shipment or market" and it was insisted that such a tax was a burden upon commerce. This Court held that the intention to ship the coal into other states did not give it immunity from state taxation and that therefore the statute was not an unconstitutional interference by the state with commerce. In the opinion it is said:

> "We are unable to discern . . . materiality or pertinency . . . in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it; and a tax upon articles in one state that are destined for use in another state cannot be called a regulation of interstate commerce, whether imposed in the certainty of a return from a monopoly existing, or in the doubt and chances because of competition. The action of the state, as a regulation of interstate commerce, does not de-

pend upon the degree of interference; it is illegal in any degree.

"We may, therefore, disregard the adventitious considerations referred to and their confusion, and, by doing so, we can estimate the contention made. It is that the products of a state that have, or are destined to have, a market in other states, are subjects of interstate commerce, though they have not moved from the place of their production or preparation.

"The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty, of exportation of a product or article from a state, determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize and withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other states, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to states other than those of their production."

Heisler v. *Thomas Colliery Co.*, 67 L. ed., 243.

In *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 67 L. ed. 929, the State of Minnesota had imposed a tax on the business of mining iron ore measured by a percentage of the value of the ore mined or produced. Substantially all of the ore when mined was loaded on cars and shipped into other states to satisfy existing contracts. In holding that a tax on production was not a burden on interstate commerce, though the ore was destined for transportation in such commerce even before it was mined, this Court said:

> "The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."
>
> *Oliver Iron Co.* v. *Lord*, 67 L. ed., p. 936.

The same holding has been made with respect to the production tax on gas in *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284, 71 L. ed. 1049.

In *Eastern Air Transport* v. *South Carolina Tax Com.*, 285 U. S. 147, 76 L. ed. 470, this Court upheld the validity of a privilege tax upon the sale of gasoline within a state, notwithstanding that the purchaser intended to use the gasoline in conducting interstate transportation by air transport lines. It was said that the purchase of sup-

plies for conducting an interstate business is not so identified with commerce as to make a tax upon the sale of such supplies invalid. The Court said:

> "Undoubtedly, purchases of goods within a state may form part of transactions in interstate commerce and hence be entitled to enjoy a corresponding immunity. But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the State upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected."

Eastern Air Tr. v. *S. C. Tax Com.*, 472.

In *Gregg Dyeing Co.* v. *Query*, — U. S. —, 76 L. ed. 852, this Court sustained the validity of a statute taxing the storage of gasoline purchased in another state, brought into the state and stored, to be used and consumed in the state. In the opinion it is said:

"The gasoline has come to rest within the State, having been placed in appellants' storage tanks and added to appellants' property kept for local purposes. In such circumstances the State has the authority 'to tax the products or their storage or sale.' Texas Co. v. Brown, 258 U. S. 466, 478, 66 L. ed. 721, 727, 42 S. Ct. 375; Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling) 262 U. S. 506, 519, 520, 67 L. ed. 1095, 1102, 43 S. Ct. 643; Hart Refineries v. Harmon, 278 U. S. 499, 501, 502, 73 L. ed. 475-477, 49 S. Ct. 188. Not only may local sales of gasoline thus brought into the State be taxed, but its use as well. This was specifically determined in Bowman v. Continental Oil Co. 256 U. S. 642, 648, 649, 65 L. ed. 1139, 1145, 41 S. Ct. 606. See Hart Refineries v. Harmon, 278 U. S. 499, 73 L. ed. 475, 49 S. Ct. 188, supra; George E. Breece Lumber Co. v. Asplund, 283 U. S. 788, 75 L. ed. 1415, 51 S. Ct. 352. There is an exception in the case of a tax directly on use in interstate commerce, as on use in interstate transportation. Helson v. Kentucky, 279 U. S. 245, 252, 73 L. ed. 683, 687, 49 S. Ct. 279; Eastern Air Transport v. South Carolina Tax Commission, decided March 14, 1932 (— U. S. —, ante, 470, 52 S. Ct. 340). In view of these well-established principles, we find no ground for concluding that the State could not impose the tax with respect to the gasoline of appellants which was kept within the State for use in their local enterprises. As the Court said, in Hart Refineries v. Harmon, 278 U. S. 499, 73 L. ed. 475, 49 S. Ct. 188, supra, interstate transportation having ended, the taxing power of the State in respect of

> the commodity may, so far as the commerce clause of the Federal Constitution is concerned, 'be exerted in any way which the State's constitution and laws permit.' This, of course, is on the assumption that the tax does not discriminate against the commodity because of its origin in another State."

Gregg Dyeing Co. v. *Query*, 76 L. ed., 855.

The case of *Helson* v. *Kentucky*, 279 U. S. 245, 73 L. ed. 683, upon which the plaintiff in error especially relies, is not in point. In that case a statute of Kentucky taxed the use of gasoline within the state. The state officials brought action to recover the tax from the operators of a ferry-boat who purchased gasoline in Illinois and used same in operating an interstate ferry-boat. The question of the right of the state to tax the storage of gasoline intended for use in interstate commerce was not involved. The question involved was the right of the state to tax the use in interstate commerce of gasoline purchased in another state. It was held that:

> "While a state has the power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce."

In the Helson case plaintiff's office and place of business and the situs of all its property was in

another state, so that, of course, there was no property or business in Kentucky to be taxed. Since there was no property situated in Kentucky upon which a tax of any kind could be imposed, the tax was necessarily a tax upon the use of gasoline which never had a situs in the state. There is an obvious distinction between taxing gasoline used for motor fuel in interstate commerce and taxing the storage of gasoline within the state. The tax involved in the present proceeding is not upon the use of gasoline, but is a tax upon the privilege of storing and distributing it within the state. In the case at bar we have property located within the State and used in such way as to constitute a business subjecting it to a privilege tax.

A state has the same right to tax the storage of property that it has to tax the production of gas, the mining of coal or the manufacture of merchandise. If destination of the product for use or shipment in interstate commerce does not affect the power of the state to tax production, mining or manufacturing, there is no reason why the intention that property stored shall ultimately be used in carrying on interstate commerce should affect the right of the state to tax its storage.

In this connection it should be pointed out that in *Gregg Dyeing Co.* v. *Query, supra,* this Court expressly sustained the validity of a tax upon the storage of gasoline, when such gasoline had been

purchased in another state but was stored in the state of the tax to be used and consumed in that state. Of course, the tax upon the storage and consumption of gasoline in the state would apply, regardless of the purpose for which the gasoline was stored. Therefore, as to the gasoline which the plaintiff stores in Tennessee, to be used and consumed in Tennessee, there can be no question concerning its liability for taxation. Such liability has been expressly fixed by the Gregg case.

The plaintiff alleges that all of the gasoline stored by it is used in essential railroad work and that it would not be possible to allocate the consumption as between interstate and intrastate commerce. This allegation refers to an allocation of the gasoline used and not to a determination of the state in which the gasoline was consumed. The determination of what amount of this gasoline stored in Tennessee is used and consumed in Tennessee could be made and it is respectfully insisted that as to gasoline stored in Tennessee for consumption in Tennessee the question of plaintiff's liability has been foreclosed by previous decisions of this Court.

In *Eastern Air Transport* v. *South Carolina Tax Commission, supra,* this Court sustained a tax upon the sale of gasoline intended to be used in interstate commerce. In the present case, as to the gasoline stored in Tennessee and intended to be

shipped to other states for use in interstate commerce, this Court is asked to hold that a tax upon the storage of gasoline is not invalid as a violation of the commerce clause merely because of an intent subsequently to ship the gasoline elsewhere and use it in interstate commerce.

VI.

THE STATUTES IN QUESTION IMPOSE A PRIVILEGE TAX AND NOT A CHARGE FOR THE USE OF THE STATE HIGHWAYS

For the appellant it is insisted that the statutes in question are not a genuine tax, but in reality are a charge placed upon users of the highway as compensation for such use. The statutes in question purport to be a tax and not a charge for the use of highways. The original statute, Chapter 58 of the Acts of 1923, is "an act requiring all persons, firms, associations . . . to pay to the State Comptroller a privilege tax." The Supreme Court of Tennessee in *Foster Creighton Co.* v. *Graham*, 154 Tenn., 412, treats the statute as a taxing statute.

Further proof, if such be needed, that these statutes impose a tax and not a charge for the use of highways, is furnished by various amendatory acts. As the gasoline statutes of Tennessee have been amended, not all of the funds derived from the gasoline tax go into the general highway fund. Chapter 54 of the Public Acts of 1927, an act providing for the establishment of the Great Smoky Mountains National Park in the State of Tennessee and providing for the acquisition of land for such park, contains a provision as follows:

"Sec. 15. *Be it further enacted*, That from and after January 1, 1932, the income derived from and representing one-tenth of one per cent per gallon of the State Gasoline Tax shall be and is hereby set apart and held in the State Treasury as a sinking fund for the payment and retirement of the principal and interest of the bonds herein authorized, such fund to be designated as 'Park Bonds Retirement Fund,' and the interest earned on such fund shall be added to the fund, and such sinking fund shall be and it is hereby specially pledged for and shall be exclusively applied to the payment of the principal and interest of such bonds until all of them shall be paid and retired. . . ."

Chapter 45 of the Public Acts of 1931 provides that two cents of the gasoline tax shall constitute a separate fund to be returned by the State to the counties for the construction of county highways, which are not a part of the State system.

Chapter 11, Acts of the 2nd Extra Session of 1931, provides that a fund equivalent to that derived from a gasoline tax of one cent per gallon shall be placed to the credit of the general fund.

These statutory enactments demonstrate conclusively that the so-called gasoline tax is in fact a tax and not compensation for the use of highways, because a substantial portion of the fund derived from such tax is not used in any highway construction, and another substantial portion of

the fund is used for the construction of rural highways which are not a part of the State system. Obviously, the money which is forthcoming from these statutes could not be compensation for the use of the highway system, since the statutes were enacted and the revenue was collected at the very outset and before the State Highway System was built.

A tax does not become a charge instead of a tax because the burden imposed generally falls upon those who benefit from it. It is true that one theory of taxation would impose burdens only upon those who receive benefits, but a tax does not derive its validity from the particular benefit which the taxpayer may receive from it. The rule is elementary that a person taxed cannot object to the tax on the ground that he receives no benefit from the application of the proceeds of the tax. The rule is well stated in Cooley on Taxation, Vol. I, Section 89:

> "For instance, every citizen is bound to pay his proportion of a school tax although he has no children, or is not a resident, and this also applies to corporations; of a police or fire tax, although he has no buildings or personal property; or of a road tax although he never used the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefits. So property within the limits of a municipality is subject to local taxation although it derives little or no benefit from the

> municipal government. This rule is often applied to the taxation for special purposes of agricultural lands situated within the corporate limits of cities. If such property was exempted, the provision of the constitution requiring taxes to be equal and uniform would be violated."

Plaintiff in error seeks to draw an analogy between the lack of benefit received by the railroad and the lack of benefit which renders a special assessment invalid. The difficulty here, however, is that it is only in case of a special assessment that it is essential to show that the fund expended will benefit the particular taxpayer. If the railroad in this case could escape liability for the gasoline tax upon the theory that it receives no benefit, then the decision of this Court in *Eastern Air Transport* v. *South Carolina Taxing Commission*, *supra*, and in *Gregg Dyeing Co.* v. *Query*, supra, was incorrect. In both of those cases the taxpayer seeking to escape liability from the gasoline tax intended to consume the gasoline by a use not upon the highways. In both of those cases the amount of the gasoline tax was substantially the same as that imposed by the State of Tennessee. In both of those cases the taxpayer was required to pay, notwithstanding that he sought to make use of the gasoline without using the state highway system.

The rule that a particular taxpayer need not benefit from a tax levied for a lawful governmental purpose is too well established to need elaboration.

However, in the present case it cannot be said that the railroad does not receive a benefit from the construction of rural roads which open up new sources of freight and passenger traffic.

In *Interstate Transit Co.* v. *Lindsey*, 283 U. S. 183, *Sproutt* v. *South Bend*, 277 U. S. 169, and other similar cases, this Court held that the State, in certain situations, denied the power of taxation by the commerce clause, may collect a reasonable charge from users of its highways, but from these decisions no inference can be drawn that the State must construct its highways by a tax or charge levied against users of the system. In other words, this Court in this kind of cases has said that a so-called charge for the use of highways is invalid if it is actually a tax, but this Court has not said that a tax is invalid if it is not substantially a reasonable charge upon the particular taxpayer. The same contention which plaintiff in error makes in this regard might be made by a farmer who uses gasoline in his tractor; it might be made by a taxpayer who pays a school tax when none of his family use the schools; it might be made by one who pays an ad valorem tax, a portion of which is used for the maintenance of a park, when the individual never uses the park; but this objection has uniformly been disallowed by the courts in all cases where it has been made.

VII.

COMMON CARRIERS BY RAILROAD AND COMMON CARRIERS BY MOTOR VEHICLE CONSTITUTE DIFFERENT CLASSES OF OCCUPATIONS WHICH THE STATE IS NOT REQUIRED TO TAX IN THE SAME MANNER OR EQUALLY

Plaintiff in error complains that because the "economic burden" imposed upon railroads by the taxing statutes of Tennessee is greater than that imposed upon common carriers by motor vehicle, it is denied a right or privilege guaranteed to it by the 14th Amendment. No discriminatory provisions in the taxing laws of Tennessee are assailed. No particular exemptions in the law favorable to motor vehicles and unfavorable to railroads are pointed out. The principal ground for complaint is that the State has seen fit to build a highway system and to permit motor vehicles to use the highway system without adequate charge, while the railroads are required to expend large sums for the maintenance of their own rights-of-way. The conclusion is sought to be reached that the gasoline taxing statutes are therefore unconstitutional as a violation of the due process of law clause or of the equality clause of the 14th Amendment.

The decisions of this Court construing the 14th

Amendment in its relation to the taxing power of the states, justify no such conclusion.

In the case of *Kelly* v. *City of Pittsburgh*, 104 U. S. 78, 26 L. ed. 658, this Court held that the fact that a taxpayer did not receive the same benefit from a tax as other citizens, and that his taxes bore an unjust relation to the benefits received, did not constitute a violation of the 14th Amendment.

In *Atchison T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, this Court held that the 14th Amendment did not forbid classification and could not be used to prevent the inequality which sometimes results from classification.

In *Michigan C. R. Co.* v. *Powers*, 201 U. S. 245, 50 L. ed. 744, this Court held that nothing in the Federal Constitution prevents a state from singling out railroad and other corporate property and taxing it for state purposes in a manner and at a rate different from that applicable to other property. In the opinion it is said:

> "There can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the 14th Amendment to the Constitution to prevent a state from changing its system of taxation in all proper and reasonable ways, nor to compel the states to adopt an iron rule of equality, to prevent the classi-

> fication of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice."
>
> *Michigan C. R. Co.* v. *Powers*, 50 L. ed., 761.

In *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 54 L. ed. 688, this Court held that the imposition of an occupation tax on wholesale dealers in oil, without exacting a similar tax from wholesale dealers in other articles, is not invalid as violating the due process of law clause of the 14th Amendment. The opinion says:

> "Still it was never contemplated, when the amendment was adopted, to restrain or cripple the taxing power of the states, whatever the methods they devised for the purposes of taxation, unless those methods by their necessary operation were inconsistent with the fundamental principles embraced by the requirements of due process of law and the equal protection of the laws in respect of rights of property."

In *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 56 L. ed. 350, this Court sustained a tax upon laundries, from which were exempted steam laundries and women engaged in the laundry business, where not more than two women are employed. Construing the 14th Amendment it was said:

> "A state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a state may carry out a policy, even a policy with which we might disagree."

In the case of *St. Louis S. W. R. Co.* v. *Arkansas*, 235 U. S. 350, 59 L. ed. 265, this Court held that the 14th Amendment does not impose an iron clad rule upon the states with respect to taxation and does prevent them from imposing unequal taxes, so long as the inequality is not based upon arbitrary discriminations. This rule was again announced in *Shaffer* v. *Carter*, 252 U. S. 37, 64 L. ed. 445.

In *Oliver Iron & Mining Co.* v. *Lord*, 262 U. S. 172, 67 L. ed. 930, this Court sustained a state tax classifying persons engaged in mining and exempting contractors who perform the labor of preparing the mines. The Court said:

> "The contentions made under the equal protection provision of the 14th Amendment and under the state constitutional provision that 'taxes shall be uniform upon the same class of subjects' present a question of classification and have been argued together.
>
> Consistently with both provisions the legislature of the state may exercise a wide discretion in selecting the subjects of taxation, par-

> ticularly as respects occupation taxes. It may select those who are engaged in one class of business and exclude others, if all similarly situated are brought within the class and all members of the class are dealt with according to uniform rules."
>
> *Oliver Iron & Mining Co.* v. *Lord*, 67 L. ed. 936.

In *Lake Superior Consolidated Iron Mines* v. *Lord*, 271 U. S. 577, 70 L. ed. 1093, this Court sustained a tax upon ore lands as a distinct class of property, which tax did not extend to quarries and forests. Again the principle was announced that the State legislature may exercise wide discretion in selecting the subjects of taxation.

From the cases cited and many other decisions of this Court the principle is deducible that the 14th Amendment cannot be used to correct mere inequalities of burden, nor hardships resulting from taxing statutes which are based upon reasonable classifications of taxpayers and property.

The differences between transportation by railroad and transportation by motor vehicle are so marked as to require no elaboration. The real complaint of the plaintiff railroad is that a new competitive business has come up within the past decade which the present taxing statutes of Tennessee—and of other states—do not reach with the same effect as in the case of railroads. It fur-

ther complains because all taxpayers who sell, distribute or store gasoline are required to pay taxes, the major portion of which are used for highway construction, and the effect of the construction of these highways is to injure the business of the railroad. However, even where the construction or improvement of a highway harms a railroad, the railroad company cannot escape liability from a general tax.

CONCLUSION

It is respectfully submitted that if this Court take jurisdiction of the present proceeding, it should hold the statutes involved constitutional and should affirm the opinion of the Supreme Court of Tennessee.

Respectfully submitted,

R. H. BEELER,
Attorney-General of the State of Tennessee.

W. F. BARRY, JR.,
Assistant Attorney-General.

EDWIN F. HUNT,
Assistant Attorney-General.